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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-254

A. F. WESTMORELAND,
Petitioner,

versus

THE STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROY O. PARKER
2225 WEST MAIN STREET
TUPELO, MISSISSIPPI 38801
COUNSEL FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO.

A. F. WESTMORELAND,
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versus

THE STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

Petitioner respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Mississippi entered herein on March 22, 1971, denying Petitioner's Petition For Re-Hearing on the affirmation of his conviction for the crime of false pretense as set out in §2149 and §2150, Mississippi Code Annotated, 1942, Recompiled.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Supreme Court of Mississippi entered on January 25, 1971 affirming the conviction of Appellant for the crime of False Pretenses. Rehearing was denied on March 22, 1971.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is unofficially reported at 246 So 2d 487 and is set out in the Appendix, hereto, pp. 23-50. Appellant was convicted upon trial by jury in the Circuit Court of Lee County, Mississippi and no opinion exists with respect to that conviction.

JURISDICTION

Appellant was convicted for violation of §2150[1] Mississippi Code 1942 Annotated, in the Circuit Court of Lee County, Mississippi on December 1, 1969. He perfected a timely appeal of his conviction to the Supreme Court of Mississippi which reversed his conviction in part on January 25, 1970. The partial reversal of the conviction under §2150 was as to sentencing in that the Supreme Court of the State of Mississippi found him guilty of a crime as set out under §2149 and not guilty of a crime as set out under §2150. In its opinion, the Supreme Court of Mississippi upheld the validity of the indictment against Appellant's contention that it was faulty under the case law of the State of Mississippi and that it was repugnant to the Constitution of the United States in that it did not inform him of the charges against him. A Petition for Re-Hearing was denied on March 22, 1971 and on May 18, 1971, Appellant filed a Notice of Appeal to this Court and the Supreme Court of Mississippi, a copy of which is set out in Appendix, pp. 52 through 53. Jurisdiction of this

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[1]See Appendix all Code Sections referring to Mississippi Code of 1942 Annotated.

Court to review the judgment of the Supreme Court of Mississippi is invoked under 28 U.S.C.A., §1257 (3).

STATEMENT

A. F. Westmoreland was indicted in the May 1969 Term of the Lee County Circuit Court. The indictment under which A. F. Westmoreland was tried was fatally defective under the law as set out in the case of *State vs. Hubanks, et al,* 99 Miss. 775, 56 So 163 (1911) and in *Langford vs State,* 239 Miss. 483, 123 So 2d 614 (1960). The reason for the indictment being fatally defective is that there was no ownership of property alleged in the indictment and the *Hubanks* Court, at Page 164 said:

> "The indictment in this case failed to charge the ownership of the money, the $300, and also failed to charge that the beneficiaries in the policy had not transferred or assigned it to Hubanks. Both these allegations were essential in this indictment. See the authorities cited in the unusually able argument of counsel for appellee.
>
> PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein set out, the action of the court below is declared correct."

In the *Langford* case, supra the Mississippi Supreme Court adhered to the ruling in *Hubanks* and made the following reference to ownership of property:

> "In the case of Hampton v. State, 99 Miss. 176, 183, 54 So 722, 723, it was held: "There was no such offense at common law as embezzlement; it is made such by statute; it is a statutory larceny. The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses, and other kindred offenses". See Voss v. State, 208 Miss. 303, 44 So 2d 402."

The *Langford* court went on to say:

> "Since the omitted allegation [speaking of ownership of property] goes to the very essence of the offense attempted to be charged the omission thereof was not waived by appellant's failure to demur thereto." We have numerous cases in Mississippi holding to this effect, Cook v. State, 72 Miss. 517, 17 So. 228; Hughes v. State, 74 Miss. 368, 20 So 838; Taylor v. State, 74 Miss. 544, 21 So 129; McGaha v. State, 173 Miss. 829, 163 So 442; Robinson v. State, 180 Miss. 774, 178 So 588; Crosby v. State, 191 Miss. 173, 2 So 2d 813; Kelly v. State, 204 Miss. 79, 36 So 2d 925; Love v. State, 211 Miss. 606, 52 So 2d 470; Cohran v. State, 219 Miss. 767, 70 So 2d 46."

After being indicted by the Grand Jury, the above-mentioned A. F. Westmoreland was tried in the Circuit Court of Lee County on the charge of False Pretense and after the State's case was presented, the Defendant, A. F. Westmoreland, upon advice of his counsel,

which at that time was believed to be sound advice, did not put on any evidence in his behalf; the reason for this was that counsel relied upon the *Hubanks* and *Langford* cases, supra, and the Defendant, relying upon counsel knowing full well that at this time he would be found guilty of False Pretense, presented no case and was in fact found guilty of False Pretense on December 1, 1969. From this conviction, he appealed to the Mississippi Supreme Court and after briefs on both sides were filed and oral argument heard, the Mississippi Supreme Court rendered an opinion on January 25, 1971 whereby the conviction was affirmed and on March 22, 1971, a Petition for Re-Hearing was denied.

The Appellant feels that the Mississippi Supreme Court, by deciding against the *Hubanks* and *Langford* cases, supra, has in fact broken the doctrine of Stare Decisis and upheld a conviction when it is contrary to the law of the State of Mississippi and when it is contrary to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that the indictment does not prevent the Appellant from being placed twice in jeopardy for the same crime and that, by not following the doctrine of Stare Decisis, the Mississippi Supreme Court has violated the Fourteenth Amendment to the United States Constitution.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

I

The ruling of the Mississippi Supreme Court by which Appellant was convicted of false pretense violates Article I, §9 and §10 of the United States Constitution because the Mississippi Supreme Court did not follow the doctrine of stare decisis and under its prior decision, had led Appellant to believe that the indictment in this case was fatally defective.

The question raised in this petition presents a serious problem of much concern to the members of the active Bar practicing criminal law. Question: Is there to be any certainty in State Courts as to the law to be applied to a given criminal case at a given time? The answer today is No, but there should be.

The *U. S. Constitution in Article I, §9 and §10* have outlawed Ex Post Facto statutes and the *Mississippi Constitution* has done so in *§16, Article III.* The framers of the Constitution saw the need and realized the importance for protection of the public from this type of legislation. The need was realized from the beginning and not added as an Amendment. However, today, a person charged with a crime and tried for that crime is subject to Ex Post Facto rulings by the highest court in his jurisdiction. Cruelty and injustice are rampant in our country today, so why should this Court allow cruelty and injustice to be administered by the Supreme Courts of the several states. The case at Bar is

a prime example of the injustice received by one accused of crime at the hands of the Supreme Court of his state.

A. F. Westmoreland was indicted by Lee County, Mississippi Grand Jury on the 26th day of May, A. D., 1969, in Cause No. 16,514 for the crime of False Pretense under §*2150, Mississippi Code of 1942 Recompiled* and subsequently was tried on November 26, 1969 and found guilty under §*2150* supra and was sentenced to serve a term of seven years in the State Penitentiary at Parchman, Mississippi, with two and one-half years suspended on good behavior. The Appellant put on no defense to the crime charged; although there was a valid defense under the laws of the State of Mississippi. The reason for no defense being presented was upon advice of counsel, said advice being given after a thorough examination of the law of the State of Mississippi concerning the charge of False Pretense.

The indictment in the case at Bar failed to allege ownership of the property obtained by false pretenses and the law of the State of Mississippi is clear that an indictment which does not allege a crime is fatally defective and can be raised for the first time at the Appellate level. The indictment in the case at Bar did not allege the ownership of the property allegedly obtained by false pretenses and this, under the case law of the State of Mississippi, was a fatal defect and according to *Kelly vs State,* 204 Miss. 79, 36 So 2d 925, the defect was jurisdictional and

> "... cannot be waived, and its validity can be challenged for the first time on appeal. Crosby

> v. State, 191 Miss. 173, 2 So 2d 813; Herron v. State, 118 Miss. 420, 79 So 289; Cook v. State, 72 Miss. 517, 17 So 228, 229."

Therefore, according to the case law in the State of Mississippi, the fact that Appellant did not raise question as to the validity of the demurrer should have no bearing upon any Appellate Court's decision.

A. F. Westmoreland, relying upon the advice of counsel, presented no defense to a crime for which he could be incarcerated in the Mississippi State Penitentiary at Parchman, Mississippi. The reason for Appellant presenting no defense was based upon advice of counsel and the advice of counsel was derived from the case law of the State of Mississippi. Counsel for Appellant knew that the doctrine of Stare Decisis would be followed as set out in *White vs Williams,* 159 Miss. 732, 132 So 573 (1931) and *Palmer vs Clarksdale Hospital,* 213 Miss. 611, 57 So 2d 476 and *Maris vs Lindsey,* 124 Miss. 742, 87 So. 12 (1921), whereby the Mississippi State Supreme Court has set out that:

> "If the facts set out in the appellees' bill in this case be true, appellant will inherit the estate of her deceased husband as the result of her own iniquitous fraud. However, it must be borne in mind that there is no such thing as a perfect system of laws. Our System of common law consists of general rules that have been found by long usage to work out justice in the great majority of cases. In exceptional cases these rules work out injustice, but such cases are rare. *The decisions of the Supreme*

> *Court constitute a body of precedents that should be followed by the courts in subsequent causes, when applicable, unless they are manifestly wrong and mischievous in their results."* (Emphasis Supplied) *White vs Williams,* supra.

Also, in *Palmer vs Clarksdale Hospital,* supra, the Mississippi Supreme Court, speaking of Stare Decisis, said:

> "Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases."

The Mississippi Supreme Court, in *Maris vs Lindsey,* supra, set out what this writer feels is the crux of this entire brief when the Court said:

> "There ought to be stability in court decisions."

A. F. Westmoreland, by and through his attorney, relied upon the case law of the State of Mississippi which states, prior to the Westmoreland decision, that the ownership of property is an essential element of the crime charged and an indictment is defective unless such ownership is clearly set out in the indictment. These cases are *State vs Hubanks, et al,* 99 Miss. 775, 56 So 163 (1911), *Langford vs State,* 239 Miss. 483, 123 So 2d 614 (1960), *Hampton vs State,* 99 Miss. 176, 54 So 722, and *Voss vs State,* 208 Miss. 303, 44 So 2d 402. The entire opinion in the *Hubanks* case reads:

> "The indictment in this case failed to charge the ownership of the money, the $300, and also failed to charge that the beneficiaries in the policy had not transferred or assigned it to Hubanks. Both these allegations were essential in this indictment. See the authorities cited in the unusually able argument of counsel for appellee.
>
> PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein set out, the action of the court below is declared correct."

The action of the Court below was to sustain the demurrer to the indictment from which the State of Mississippi appealed.

In *Langford vs State*, supra, the same question, that being the ownership of property, was raised and the Court said:

> "The question therefore presented is whether the failure to charge the ownership of the cattle in question is a mere defect in the indictment or is an essential element in the crime attempted to be charged. . . . In Herron v. State, 118 Miss. 420, 79 So 289, it was held: "Since the omitted allegations goes to the very essence of the offense attempted to be charged the omission thereof was not waived by appellant's failure to demur thereto." We have numerous cases in Mississippi holding to this effect, Cook v. State, 72 Miss. 517, 17 So 228; Hughes v.

> State, 74 Miss. 368, 20 So 838; Taylor v. State, 74 Miss. 544, 21 So 129; McGaha v. State, 173 Miss. 829, 163 So 442; Robinson v. State, 180 Miss. 774, 178 So. 588; Crosby v. State, 191 Miss. 173, 2 So 2d 813; Kelly v. State, 204 Miss. 79, 36 So 2d 925; Love v. State, 211 Miss. 606, 52 So 2d 470; Cohran v. State, 219 Miss. 767, 70 So 2d 46."

After setting out that the ownership of property was an essential element of the crime charged, the *Langford* Court said:

> "In the case of Hampton v. State, 99 Miss. 176, 183, 54 So 722, 723, it was held: "There was no such offense at common law as embezzlement; it is made such by statute; it is a statutory larceny. The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses, and other kindred offenses". See Voss v. State, 208 Miss. 303, 44 So 2d 402."

It is clear from these cases, that prior to January 25, 1971, the Mississippi Supreme Court had made the allegation as to the ownership of property an essential element of the crime and therefore declared an indictment, which failed to directly allege ownership of the property allegedly obtained by false pretense, as fatally defective. The indictment in the Westmoreland

case (R-2)[2] did not allege the ownership of the property allegedly taken, and therefore the Supreme Court of the State of Mississippi should have reversed and remanded this case for a new trial. It did not do so and thereby deprived A. F. Westmoreland of a fair and impartial trial and thereby denied him his constitutional rights under the *Fifth* and *Fourteenth Amendments* to the *United States Constitution.*

As Justice Inzer stated in his dissenting opinion:

> "Appellant in making his defense to the charge against him was entitled to rely upon the foregoing decisions, and our failure to adhere to these decisions deprives him of a valuable right."

A. F. Westmoreland, Appellant in this cause, has been clearly deprived of his *Fourteenth Amendment* rights:

> "... nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Mississippi Supreme Court has denied A. F. Westmoreland his Fourth Amendment rights by not granting to A. F. Westmoreland due process of law by reason of the fact that they allowed the State of Mississippi to convict Appellant under a false indictment and a-

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[2]References are to pages of the original record which has been certified and transmitted to this Court by the Clerk of the Mississippi Supreme Court.

gainst the case law of the State of Mississippi. The Supreme Court has further denied equal protection of the laws to A. F. Westmoreland by changing the law upon which a man was basing his freedom. It is understood that equal protection and due process, as set out in the *Fourteenth Amendment to the United States Constitution* have probably had more words uttered over them than any simple passages ever written by man. It is certain that A. F. Westmoreland does not know the meaning of these words and it is doubtful that this writer does, but due process seems to me to indicate that any person convicted of a crime in these United States shall be convicted by the following of the law. This does not mean, in this writer's opinion, the law that may come into effect some six months or six years later, but the law that is in effect at the time of the accused's trial. The words "equal protection" seems to indicate that any person accused of a crime shall be protected as all other persons accused of the similar crime and A. F. Westmoreland is the only person in the State of Mississippi that has been denied equal protection concerning the charge of false pretenses and thereby has been denied due process. All other persons, prior to the affirmation of the conviction of A. F. Westmoreland, had been granted a new trial by the Mississippi Supreme Court when the indictment failed to clearly allege the ownership of the property; and the indictment in A. F. Westmoreland's case did not allege ownership, and listening to his attorneys, this has cost A. F. Westmoreland his liberty. This cannot be fair.

What good is a thing called law if prosecutors, trial judges and Supreme Court judges do not follow it?

The people of the State of Mississippi have often times forgiven their judges for deciding cases which they drastically opposed by saying, "He can do nothing about it, it is the law" or "He was only following the law". The Mississippi Supreme Court did not follow the law in the case at Bar and this Honorable Court should make rulings whereby the State Supreme Court of the several states are obliged to follow the doctrine of Stare Decisis in criminal cases where an Appellant is to be injured if they do not.

It is understood by Appellant that numerous states within the United States do not require the direct allegation of ownership to the charge of False Pretense in the indictment, but nowhere can it be found that the states which do not require direct ownership of property in the indictment, has made such a ruling at the expense of the accused. All jurisdictions which now hold that direct ownership is not required in the indictment have forewarned the Bar in their respective jurisdictions as to this change of the law and have given opportunity for defense lawyers to prepare for this change. The State of Mississippi, by its Supreme Court, has from the clear blue sky, dropped a weight upon A. F. Westmoreland which he should not have to bear and which is not fair for him to bear.

This Honorable Court, to this writer's knowledge, has never applied Ex Post Facto rulings to a person accused of a criminal charge and if any changes have been made in the criminal law by this Honorable Court, it has been to advance the doctrine of fairness and justice under the law. Nowhere can I find where this

Court has changed the law to the detriment of one accused of a crime.

II

The Mississippi Supreme Court, in upholding the invalid indictment on appeal, denied Appellant of his Sixth Amendment rights, that being to be informed of the nature and cause of the accusation.

A. F. Westmoreland, by and through the Mississippi State Supreme Court, in its ruling of *A. F. Westmoreland vs State of Mississippi*, Miss. 246 So 2d 487 (1971), has denied A. F. Westmoreland of his Sixth Amendment rights as set out in the United States Constitution. This Amendment reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ..."

"And to be informed of the nature and cause of the accusation" means by a valid indictment and the indictment in the case at Bar under the laws of the State of Mississippi, as heretofore set out, was not a valid indictment and therefore Appellant was denied his Sixth Amendment rights and is entitled to a new trial based upon a valid indictment.

III

The Mississippi Supreme Court, by refusing to apply its prior rulings concerning false pretense and ownership of property has denied Appellant equal protection and due process under the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

A. F. Westmoreland has been denied his Constitutional guaranteed rights under the *Fourteenth Amendment of the United States Constitution.* There may be no case law for this Court to right wrongs or correct injustices, but to the people of the United States of America, who have fought long and hard for this Constitution and the ideals of justice and fairness at law, demand that this Court intervene when cases show that an injustice has clearly been perpetrated upon a citizen of this country. A. F. Westmoreland, now age 65, relied upon the law of the State of Mississippi in preparing his defense, and in so relying did not present a defense at the trial level. The Supreme Court of the State of Mississippi has abruptly changed its rulings concerning ownership of property in indictments concerning larceny or statutory larceny. This Court cannot idly sit by and allow a citizen of this country to be deprived of the right to "life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". *U. S. C. A. Const. Amend. 14.* This case comes to this Court upon a plea for justice and a decision by this Court, that in criminal cases the Supreme Court of the several states are bound by the law under which a man was indicted and under the law which a man was tried and cannot constitu-

tionally deprive a person of liberty by the simple changing of the minds of five men. The doctrine of Stare Decisis is made applicable to the states through the Fourteenth Amendment whereby it states no person shall be deprived of life, liberty or property without due process of law nor deny to any person within its jurisdiction, the equal protection of the laws.

The plea of A. F. Westmoreland is not contrary to any constitutional theory, or would not deny to the several states their right to pass and enforce laws. It would only command the state Supreme Courts to apply the law as of the time of conviction, and would insure that a person accused of crime is not subject to the whims and fancy of a majority of the Judges of a given state Supreme Court.

Allow A. F. Westmoreland to be treated as all persons before him, and by doing so, be assured that no person shall undergo the pain and suffering which naturally flow from a denial of equal protection and due process.

IV

That the Mississippi Supreme Court, by refusing to declare the indictment in the case at Bar defective, because it did not set out the ownership of the property, has denied the Appellant of his Fifth Amendment rights under the United States Constitution.

The Appellant, A. F. Westmoreland, could not, under the indictment handed down against him by the Lee County, Mississippi Grand Jury, make a plea of "Double

Jeopardy" to a subsequent trial arising from the same circumstances. The reason for this is that there has been no mention made as to the ownership of the money and at a second trial, by alleging the same facts and setting out that the money was the property of John Doe, a second jury could convict A. F. Westmoreland for the exact same transaction and Appellant would be unable to assert his Fifth Amendment rights under the United States Constitution.

This Court, in *Green vs United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) states:

> "The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

The *Green* Court, in citing *Ex Parte Lange*, 18 Wall. 163, at Page 169, 21 L. Ed. 872 adopted the language of *Ex Parte Lange* which is as follows:

> "The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

I know that this Court may reason that A. F. Westmoreland has not yet been indicted a second time under the same set of facts for which he was convicted in the case at Bar. Under the indictment as set out, A. F.

Westmoreland would be unable to make a plea of former jeopardy because the ownership of the property is not alleged and the exact same set of facts, with the insertion of property of John Doe, would change the circumstances to such an extent that Appellant would be unable to make his plea of double jeopardy at a subsequent trial, and therefore this Court should reverse this case and require the indictment to be so clear and specific as to prevent the slight possibility of Appellant's inability to plead former jeopardy under the Fifth Amendment to the United States Constitution.

It is the functions of the Courts to prevent injustice and under the indictment as set out at R-2 of the original transcript of this proceeding, A. F. Westmoreland can be subjected to a trial on the exact same facts, the only difference being a named owner of the property received. The Fifth Amendment to the Constitution was designed to prevent a person from being subjected to the possibility of being twice placed in jeopardy when the Fifth Amendment said:

> "... The subject for the same offense to be twice put in jeopardy of life or limb..."

It is clear, from a reading of the indictment that A. F. Westmoreland could be subject for the same offense and therefore his Fifth Amendment rights under the United States Constitution have been violated when the Mississippi Supreme Court allowed his conviction to stand on such a faulty indictment.

CONCLUSION

The Mississippi Supreme Court, by upholding the conviction of Appellant in the case at Bar, has set a dangerous precedent for criminal cases in the State of Mississippi and has denied Appellant of several Constitutional rights which have heretofore been set out. The doctrine of Stare Decisis has been abrogated by the Mississippi Supreme Court to the detriment of one of its' citizens and by doing so has denied Appellant equal protection under the law within the meaning of the Fourteenth Amendment of the United States Constitution. A decision by this Honorable Court at this time, setting out a principle that the states cannot depart from established law within a jurisdiction would give much needed stability to the criminal law of this country. It is understood that the law changes and that changes are necessary in the law but there can be no need for change which is detrimental or injurious to a citizen of this country. If Supreme Courts of the several states are allowed to modify or change the law according to their wishes, then no citizen is safe and the protections and safeguards as built into the United States Constitution and the Constitutions of the several states, are merely words which have no meaning or authority. The Westmoreland decision is the first backward step this writer has ever seen an Appellate Court take and this decision cannot stand.

If a citizen of this Nation cannot rely upon the law as a safeguard to his liberties, then our system of Government by law, not might, is dead and free people will not tolerate such actions by our Courts. It is a sacred trust which we, as members of the Bar and this Court,

as the highest judiciary body in the world, have been given. This trust is to protect the citizens of this nation and to insure that all people are treated equally, and by doing this, we have given a stability to this Nation which none before us have ever known.

This Court has never handed down a rule of law which was retroactive and thereby deny a person of his liberty. The only retroactive decisions of this Court have been an assurance that persons previously deprived of their liberties, under an unconstitutional act, would have such liberties restored.

The Mississippi Supreme Court has in effect said that although you were not guilty under our prior rulings, we are now declaring you guilty and you shall pay the penalty. This decision is not right and this Honorable Court should so state. Any change which will be detrimental to a citizen of this Nation, as concerning the law, should be advanced without injury and if a Court is to change its prior rulings, it should do so in advance by reversing and remanding for new trial, but in the opinion stating that in the future, we shall do thus and so.

This Court should grant this Petition for Certiorari and hand down a decision whereby the states are bound under the Fourteenth Amendment of the United States Constitution tc apply the law as to persons accused of crime as of the time of the accusations and no Court should have the right to affirm a conviction based upon a principle or theory of law which it expounds as of the time of the affirming of the conviction.

The Appellant, A. F. Westmoreland, has been, in the words of Justice Inzer, denied a valuable right and this Court should see that no person accused of a crime is denied such rights. This writer most respectfully submits to this Court that when all is said and done, the Appellant, A. F. Westmoreland, has been dealt a great injustice before the Bar of Justice and this Court is his last resort and this Court should and must correct the injustice done to a citizen of this country.

Respectfully submitted,

ROY O. PARKER
2225 West Main Street
Tupelo, Mississippi 38801
ATTORNEY FOR
APPELLANT

APPENDIX

A. F. WESTMORELAND
versus
STATE of Mississippi.
No. 46118.

Supreme Court of Mississippi.
Jan. 25, 1971.

Rehearing Denied March 22, 1971.

By a judgment of the Circuit Court, Lee County, N. S. Sweat, Jr., J., the defendant was convicted of the crime of false pretenses and he appealed from the conviction and sentence. The Supreme Court, Smith, J., held that indictment sufficiently charged facts which constituted crime of false pretenses under statutes relating to such offense for persons who defraud by color of any false token or writing or by another false pretense, and indictment was not defective because of misrecital of statutory section dealing with use of promissory note or other negotiable evidence of debt in committing offense, but it was error to impose sentence under the latter statute providing a harsher penalty where the facts charged in indictment and shown by proof did not establish commission of the offense by circumstances necessary to bring it within the latter statute.

Conviction affirmed, sentence set aside, and case remanded for imposition of sentence.

Rogers, Brady and Patterson, JJ., dissented from denial of petition for rehearing along with Inzer, J., who filed an opinion.

1. Indictment and Information KEY 71

Office of indictment is to apprise defendant of charges against him in fair and intelligible language in order that he may be able to prepare his defense, and the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceeding.

2. False Pretenses KEY 32

Requirements of specificity with respect to allegation of ownership in indictment charging false pretenses demand neither a deraignment of title nor a statement in direct terms showing perfect title, where ownership of money or property obtained reasonably appears from whole indictment and there is nothing in indictment to support or suggest any other reasonable conclusion.

3. False Pretenses KEY 32

Indictment which charged, in effect, that defendant with intent to cheat and defraud bank sold false conditional sales contract to bank and thereby fraudulently obtained from bank $8,100 in violation of specified statute sufficiently charged ownership by bank of the money allegedly obtained by false pretenses. Code 1942, §2150.

4. Criminal Law KEY 991
False Pretenses KEY 26
Indictment and Information KEY 108

Indictment sufficiently charged facts which constituted crime of false pretense under section relating to such offense by persons who defraud by color of any false token or writing or by another false pretense, and indictment was not defective because of misrecital of statutory section dealing with use of promissory note or other negotiable evidence of debt in committing offense, but it was error to impose sentence under the latter statute, providing a harsher penalty, where the facts charged in indictment and shown by proof did not establish commission of the offense by circumstances necessary to bring it within the latter statute. Code 1942, §§ 2149, 2150.

Roy O. Parker, Tupelo, for appellant.

A. F. Summer, Atty Gen., by Guy N. Rogers, Asst. Atty. Gen., and P. Roger Googe, Jr., Sp. Asst. Atty. Gen., Jackson, for appellee.

SMITH, Justice:

A. F. Westmoreland was convicted of the crime of false pretenses in the Circuit Court of Lee County and sentenced to serve a term of 7 years in the penitentiary, of which 2 1/2 years were suspended on good behavior. He appeals from that conviction and sentence.

The indictment on which Westmoreland was tried, omitting the formal part, was as follows:

> [B]eing then and there engaged in the business of selling farm machinery and equipment, feloniously and fraudulently represented to the Peoples Bank and Trust Company, Tupelo, Mississippi, a corporation, that a certain negotiable evidence of debt, to-wit: a conditional sales contract #39227, dated October 19, 1968, and purportedly signed by one D. J. "Doc" Kitchens, for the purchase of one Self-Propelled New Holland Combine, serial #341792, for the amount of $8950 was a valid contract, representing evidence of a bonafide purchase and a sale agreement between the said D. J. "Doc" Kitchens and the said A. F. Westmoreland, the said A. F. Westmoreland then and there well knowing the said conditional sales contract to be a false contract and not representing evidence of a valid purchase and sale transaction between the said A. F. Westmoreland and the said D. J. "Doc" Kitchens, and by virtue of this false representation and false pretense, that the said A. F. Westmoreland did, with intent to cheat and defraud the said Peoples Bank and Trust Company, sell the said conditional sales contract to the said Peoples Bank and Trust Company, and did thereby fraudulently obtain from the said Peoples Bank and Trust Company, Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the

> United States, in violation of Section 2150 of the Mississippi Code contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Neither the sufficiency nor the validity of the indictment was challenged in the trial court by demurrer, motion to quash or otherwise. Moreover, the motion for a new trial, made by Westmoreland following his conviction, did not assign, as a ground therefor, any defect or deficiency in the indictment.

It is now argued, however, that appellant's motion for a directed verdict of not guilty should have been sustained because: (1) The indictment failed to state the ownership of the $8100 obtained from the bank, and (2) the proof was insufficient to show a violation of Mississippi Code 1942 Annotated section 2150 (1956) as alleged in the indictment.

In support of the first of these contentions (that the indictment failed to show ownership of the money), appellant relies on Langford v. State, 239 Miss. 483, 123 So.2d 614 (1960), and the authorities therein cited.

In *Langford,* the appellant had been indicted for embezzling two cows, and the indictment omitted to state to whom the cows belonged. The Court, in concluding to reverse, said:

> The appellant failed to demur to this indictment but he objected to the testimony as to ownership of the property, moved for a directed verdict and requested the Court to peremptorily instruct the jury to find him not guilty. There was also a motion for a new trial, due to the fact that the indictment in this case was void because it did not set out who owned the property alleged to be embezzled. (Id. at 486, 123 So.2d at 616.)

[1] An indictment, of course, constitutes the "pleading" in a criminal case. Its office is to apprise the defendant of the charge against him in fair and intelligible language (1) in order that he may be able to prepare his defense, and (2) the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceedings. There is, however, a trend away from the unnecessary redundancy and prolixity of former times.

[2] The requirements of specificity with respect to allegation of ownership demand neither a deraignment of title nor a statement in "direct terms" showing perfect title where ownership of the money or property obtained reasonably appears from the whole indictment and there is nothing in the indictment to support or suggest any other reasonable conclusion.

As stated by this Court in Neece v. State, 210 So.2d 657, 659 (Miss. 1968), in quoting with approval language used in State v. Dodenhoff, 88 Miss. 277, 40 So. 641 (1906):

> Preserving to a defendant the right to be duly informed of the nature and cause of the accusation made against him, there ought not to be, in addition to this, insistence upon forms which are purely technical and surplusage. There are too many reversals by far on technical grounds. They ought to be had, in those cases where the defendant is shown by the testimony to be manifestly guilty, only upon objection having real and substantial merit. 88 Miss. at 288, 40 So. at 643.

[3] In the case here, after identifying beyond question the false writing sold to the bank by appellant and by means of which, the indictment charges, he fraudulently obtained from the bank $8100, in money, the indictment continues:

> [T]hat the said A. F. Westmoreland did, *with intent to cheat and defraud the said Peoples Bank and Trust Company*, sell the said conditional sales contract *to the said Peoples Bank and Trust Company*, and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company*, Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code, * * * (Emphasis added.).

In Cohen v. State, 101 Ga.App. 23, 27-28, 112 S.E.2d 672, 676 (1960), the Court of Appeals of Georgia, speaking to a contention that an indictment insufficiently set

out ownership of funds obtained by false pretenses, said:

> The indictment in this case alleges that 'Clarence Orr paid the sum of $2,100' for the worthless stock, 'whereby the said Clarence Orr was cheated and defrauded out of the sum of $2,100.' This is a sufficient allegation as to the ownership of the money under the authority of Scott v. State, 53 Ga.App. 61, 66, 185 S.E. 131.

In State v. Timmerman, 88 Utah 481, 487, 488, 55 P.2d 1320, 1323, concurring opinion, 56 P.2d 1354 (1936), the Utah Supreme Court in discussing the question, said:

> Appellant, however, argued that the information does not state facts sufficient to constitute a public offense. We undertake to dispose of this question, as the same question may arise upon a new trial. The argument is based upon the contention that, in order to state the offense of obtaining money under false pretenses, the information must affirmatively and specifically allege that the ownership of the property, unless there is some legal excuse stated in the indictment of information for omitting the allegation. There is a division of authority upon that question. We need cite only an illustrative case on each side of the controverted question. New Jersey holds squarely in the case of State v. Samaha, 92 N.J.Law 125, 104 A. 305, 306, that: "'Actual ownership' of the money or goods by the person upon whom the cheat is

practiced is not essential. It is sufficient if he had lawful possession and dominion of the same." New Mexico and some other jurisdictions hold that an indictment or information for obtaining money by false pretenses is fatally defective unless the ownership of the property is directly and distinctly alleged. State v. Faggard, 25 N.M. 76, 177 P. 748. In the absence of statute the weight of authority, numerically, is with the rule announced by the case last above cited.

In a number of jurisdictions it is held that it is sufficient if it appears from the indictment or information to whom the property belonged. In the case of People v. Skidmore, 123 Cal. 267, 55 P. 984, the situation was presented of one fraudulently obtaining a signature to a promissory note. It was there held that the facts showed the ownership of the note as fully as though there was a direct allegation in the pleading to that effect. In the instant case it is made to appear from the allegations of the information, although not directly alleged, who the owner of the check was. It is made to appear that the check was the property of the Ostler Candy Company with such certainty that no other implication could possibly arise. We think the information sufficiently alleges ownership, and being attacked on no other ground, the trial court did not err in admitting evidence over objection that the information did not state facts sufficient to constitute the offense charged.

In Midgley v. State, 29 Okl.Cr. 108, 232 P. 967 (1925), the Criminal Court of Appeals of Oklahoma, in rejecting a contention that an information charging false pretenses was insufficient because it failed "to allege the ownership" (of the property obtained), said:

> Several assignments of error are presented for the reversal of this case, it being first contended that the amended information on which plaintiff in error was tried is insufficient, in that it fails to allege unequivocally the ownership of the property charged to have been obtained by the false pretenses set out as the basis of the amended information. Numerous authorities are cited to the effect that it is necessary to state to whom the property belonged. The amended information does not in direct terms aver the ownership of the property. This court in the case of Fuller v. Ter., 2 Okl.Cr. 86, 99 P. 1098, upheld an information in practically the same language as the information in this case.
>
> It has been held in other jurisdictions that it is not a fatal defect to fail to allege the ownership in direct terms, if the indictment or information as a whole clearly discloses that fact. State v. Knowlton, 11 Wash. 512, 39 P. 966; Griggs v. United States, 9 Cir., 158 F. 572, 85 C.C.A. 596; State v. Balliet, 63 Kan. 707, 66 P. 1005; People v. Skidmore, 123 Cal. 267, 55 P. 984; State v. Boon, 49 N.C. 463; McClintock v. State, 98 Neb. 158, 152 N.W. 378; People v. Monroe, 64 App.Div. 130, 71 N.Y.S. 803. See, also, in this con-

nection Douglas v. State, 15 Okl.Cr. 648, 179 P. 947; Bennett v. State, [21] Okl.Cr. [27,] 204 P. 462.

In Ireton v. State, 29 Okl.Cr. 266, 272. 233 P. 771, 773 (1925) the Court said in discussing a similar question:

> It appears to us that an allegation that a false pretense is made to a person, and, believing and relying thereon. and by reason thereof, the person to whom the representation is made parts with money is a sufficient allegation as to the ownership. The mere fact that the legal ownership of the money was in some other person who might ultimately have to bear the loss would not be available to the person accused. In the instant case it certainly made no difference to the plaintiff in error whether the money paid over to him on the forged note and mortgage was the property of the First State Bank of Ardmore or of some other person. The transaction is described with sufficient certainty to identify the act, and, if the allegation as to the person injured be erroneous, it is not material, nor does it result in any miscarriage of justice.

We think the better reasoned view is that the allegations of an indictment for false pretenses, with respect to ownership of the money or property fraudulently obtained, may be sufficient without the use of direct words, where such ownership appears from a reasonable construction of the indictment as a whole.

After careful consideration of the indictment in the present case we have concluded that in charging that Westmoreland,

> [W]*ith intent to cheat and defraud the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. * * * (Emphasis added.)

sufficiently charged ownership by the Peoples Bank and Trust Company of the money obtained.

[4] The second of appellant's contentions involving the indictment is that the proof failed to show a violation of Mississippi Code 1942 Annotated section 2150 (1956), referred to in the indictment, and for the reason he was entitled to a directed verdict of not guilty.

Mississippi Code 1942 Annotated section 2150 (1956) actually is a continuation of and dependent upon, section 2149, wich precedes it. Section 2149 defines the crime of false pretenses, and section 2150 merely adds another grade of the same offense for which it provides a more severe penalty when it is committed with the additional elements there enumerated. These sections are as follows:

Section 2149.

Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained.

Section 2150.

If the false token by which any money, personal property, or valuable thing shall be obtained, as specified in the last section, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any person, banking company, or moneyed corporation not in existence, the person convicted of such cheat shall be punished by imprisonment in the penitentiary not exceeding seven years.

In 41 Am.Jur.2d Indictments and Informations section 88 (1968) it is stated:

Although there must be such specification of language as to bring the charge within the particular portion of the statute on which it is

based, it has been held not necessary, where the offense is otherwise sufficiently particularized, to specify the exact section of the statute which is alleged to have been violated. In some jurisdictions, there are statutes providing that the statutory provision alleged to have been violated shall be set forth, and it has been held that a statute providing that it shall be sufficient to charge the defendant by using the name and article number of the offense committed is void, *but citation of the wrong statute in an indictment or information will be treated as mere surplusage when objection thereto is first raised on appeal unless it appears that defendant was misled or prejudiced.* (Emphasis added).

In 42 C.J.S. Indictments and Informations § 138 (1944), the rule is stated thus:

As a general rule, a misrecital of the statute does not avoid the indictment where the facts stated constitute an offense under any statute, especially where the objection is raised after plea of guilty. The misrecital may be rejected as surplusage, at least where the conclusion is generally as "contrary to the statute in such case made and provided." However, the indictment may be invalidated by a material misrecital of the statute, where reference to the statute must be considered for the purpose of supplying an insufficient description of the offense, and the effect of the erroneous citation is to mislead or fail to inform accused fully and clearly of the charge he has to meet.

In Harper v. United States, 27 F.2d 77, 79 (8th Cir. 1928), the Court said:

> The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion, which may or may not be correct, and neither adds nor detracts from the allegations.

In White v. State, 169 Miss. 332, 338, 153 So. 387, 388 (1934), in rejecting a contention that an indictment was defective because it contained an incorrect citation of a statute alleged to have been violated, this Court said:

> It is also contended that the indictment is defective because it concludes with the words, "contrary to section 987, Mississippi Code of 1930, and against the peace and dignity of the State of Mississippi." This reference to section 987, Code 1930, is manifestly erroneous, as that section merely provides the penalty that may be imposed upon a conviction for murder. However, this reference to the statute was mere surplusage in the indictment, and the appellant could not have been prejudiced by this erroneous reference thereto. Smith v. State, 58 Miss. 867.

In the case now before us the attention of the trial court was not drawn to this matter in any way. The question was not raised either by demurrer, motion to quash, or in appellant's motion for a new trial made following his conviction. As in other pleadings, the

allegations of fact control as against legal conclusions of the pleader. We have concluded that the indictment in this case sufficiently charged facts which constituted the crime of false pretenses as defined by Mississippi Code 1942 Annotated section 2149 (1956). The proof overwhelmingly supported the charge against appellant, as laid in the indictment. However, it was error to impose sentence under the provisions of Mississippi Code 1942 Annotated section 2150 (1956), since the facts charged in the indictment and shown by the proof do not show that the commission of the offense was accompanied by the circumstances necessary to bring it within that section.

Other matters assigned as error have been examined and considered and are without merit.

The conviction of appellant of the crime of false pretenses (as defined in Mississippi Code 1942 Annotated section 2149 [1956]) is affirmed, the sentence imposed under section 2150 is set aside, and the case is remanded for imposition of sentence as provided by section 2149.

Conviction of appellant of the crime of false pretenses (as defined in Mississippi Code 1942 Annotated section 2149 [1956]) affirmed, the sentence imposed under section 2150 set aside, and the case remanded for imposition of sentence as provided by section 2149.

GILLESPIE, P. J., and PATTERSON, INZER and ROBERTSON, JJ., concur,

ON PETITION FOR REHEARING

INZER, Justice:

A majority of the justices of this Court are of the opinion that the Petition for Rehearing in this case should be denied, and it is therefore, denied. However, Justices Rodgers, Brady, Patterson and the writer are of the opinion that it should be granted and dissent from the denial of the petition, for the reason that the decision in this case fails to follow the plain holding in several cases heretofore decided by this Court.

Appellant in his petition for a rehearing correctly points out that in deciding this case, we did not follow the case law of this state with respect to the allegation of direct ownership of property alleged to have been obtained by the appellant from the bank. In Hampton v. State, 99 Miss. 176, 54 So. 722 (1911), this Court said:

> The indictment charges the appellant with embezzling the funds of the American Express Company, "which is duly incorporated," while the evidence for the state showed that the American Express Company was not a corporation, but a partnership. It is contended for the appellant that this was a material variance between the indictment and proof. This question was properly raised in the court below by motion to exclude the testimony for the state, which was overruled, by a request for a peremptory instruction to the jury to return a verdict of not guilty, which was denied, and by the motion for a new trial. *There was no such*

> *offense at common law as embezzlement; it is made such by statute; it is a statutory larceny. The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen*, apply with equal force to the crimes of embezzlement, *false pretenses*, and other kindred offenses. 2 Bishop's New Criminal Procedure, § 320; State v. Tatum [96 Miss. 430], 50 So. 490. (Emphasis added) (99 Miss. at 183, 54 So. at 723).

In State v. Hubanks, 99 Miss 775, 56 So. 163 (1911), the trial court sustained a demurrer to the indictment which, omitting the formal parts, stated:

> • • • unlawfully and feloniously devising and designedly intending to cheat and defraud the International Order of Twelve of Knights and Daughters of Tabor, a corporation, and one Isaac Cook and one Manuel Potts having then and there a certain life insurance policy heretofore issued by the said corporation upon the life of one Piley Cook, which said policy was then in full force and effect and binding upon the said corporation and the said Piley Cook, and by which said policy the said corporation agreed and became bound to pay to the beneficiaries named therein, to-wit, Isaac Cook and Manuel Potts, three hundred dollars in money upon the death of the said Piley Cook, a more particular description of the said insurance policy being to the grand jurors unknown, did then and there unlawfully, feloniously, falsely, de-

signedly, and fraudulently pretend to the said corporation that the said policy was the property of the said Hubanks, and that the said Hubanks was the beneficiary named in the said policy, and by virtue of a false token in writing, called a proof of death, did then and there unlawfully, feloniously, falsely, designedly, *and fraudulently pretend to the said corporation* that the said Piley Cook was dead and the said *sum of three hundred dollars was due and payable by the said corporation to the said Hubanks* by reason of the terms of the said policy and of the death of the said Piley Cook and of the said proof of loss, a more particular description of the said proof of loss being to the grand jurors unknown, by means of which said false pretenses they, the said Hattie Clarke, John Hubanks, and J. E. Walker, did then and there unlawfully, feloniously, falsely, designedly, and *fraudulently obtain of and from the said corporation three hundred dollars in money, of the value of three hundred dollars; whereas, in truth and in fact,* the said policy was not the property of the said Hubanks, and the said Hubanks was not the beneficiary named in the said policy, and the said Piley Cook was not dead, but was then living, *and the said sum of three hundred dollars was not due and payable by the said corporation to the said Hubanks* by reason of the terms of said policy, and by reason of the death of the said Piley Cook, and by reason of said proof of loss, all of which they, the said Hattie Clarke, John Hubanks, and J. E Walker, then

> and there well knew • • •. (Emphasis added). (99 Miss. at 775, 776 and 777, 56 So. at 164).

This Court held that the indictment failed to charge the ownership of the money obtained from the corporation and that it was defective for this reason.

In comparing what is said in the foregoing indictment concerning the ownership of the property, we find no material difference in these allegations than those contained in the indictment in the case before us. It has the following charge relative to the ownership of the property.

> [T]hat the said A. F. Westmoreland did, *with intent to cheat and defraud the said Peoples Bank and Trust Company*, sell the said conditional sales contract *to the said Peoples Bank and Trust Company*, and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company*, Eight Thousand One Hundred and No/100 Dollars ($8,100.00), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code • • •. (Emphasis added).

If the indictment in *Hubanks* was defective for failure to charge the ownership of the money, the indictment in the present case is certainly defective. It is clear that this Court held in *Hubanks* that the ownership of the money or property alleged to have been obtained by false pretense had to be directly charged and could not be inferred by a construction of the indictment as a whole.

In Langford v. State, 239 Miss. 483, 123 So.2d 614 (1960), the indictment charged, omitting the formal parts:

> "That Albert Langford late of the County aforesaid, on or before the 5th day of October and in the year of our Lord, 1959, in the County and State aforesaid, and within the jurisdiction of this Court, *being then and there the manager and agent of Ben Walker, Sr. and Ben Walker, Jr's cattle farm*, did then and there by virtue of his employment as such manager and agent have under his care two red white-face Hereford heifers, one weighing approximately 500 pounds of the value of $125.00 and the other weighing approximately 450 pounds of the value of $115.00, good and lawful money of the United States of America, both said heifers having a V notch and tatoo marks in ear of each heifer, a better description being to the grand jurors unknown, *said 2 heifers being of the aggregate value of approximately $240.00, good and lawful money of the United States of America, which said property had come into his possession and had been intrusted to his care and keeping by virtue of his said employment as such manager and agent as aforesaid, and did afterwards then and there, without the consent of said Ben Walker, Sr or said Ben Walker, Jr. wilfully, unlawfully, fraudulently and feloniously embezzled said property and fraudulently and feloniously convert same to his own use and benefit.*" (Emphasis added). (239 Miss. at 485, 486, 123 So.2d at 615).

This Court said in regard to this indictment:

> In this case there is no statement at all in the indictment as to the ownership of the property. In Herron v. State, 118 Miss. 420 79 So. 289, it was held: "Since the omitted allegation goes to the very essence of the offense attempted to be charged the omission thereof was not waived by appellant's failure to demur thereto." We have numerous cases in Mississippi holding to this effect, Cook v. State, 72 Miss. 517, 17 So. 228; Hughes v. State, 74 Miss. 368, 20 So. 838; Taylor v. State, 74 Miss. 544, 21 So. 129; McGaha v. State, 173 Miss. 829, 163 So. 442; Robinson v. State, 180 Miss. 774, 178 So. 588; Crosby v. State, 191 Miss. 173, 2 So.2d 813; Kelly v. State, 204 Miss. 79, 36 So.2d 925; Love v. State, 211 Miss. 606, 52 So.2d 470; Cohran v. State, 219 Miss. 767, 70 So.2d 46. (239 Miss. at 487, 488, 123 So.2d at 616).

We are unable to see any material difference in the charge in the foregoing indictment relative to the ownership of the property and the charge in the indictment in the present case. We affirmed the decision in *Langford* in Meyer(s) v. State 193 So.2d 728 (Miss. 1967), by saying:

> This is an appeal from a judgment of conviction of the crime of embezzlement. In all essential respects the indictment is in the exact language of the indictment in Langford v. State, 239 Miss. 483, 123 So.2d 614 (1960). In that case this Court reversed because the indictment did

> not set out who owned the property allegedly embezzled. In this case, as in *Langford*, the defendant did not demur to the indictment. In *Langford* the Court held that the failure of the indictment to name the owner of the property allegedly embezzled was not a formal defect that could be corrected by amendment under Mississippi Code Annotated section 2449 (1956) and that Langford had not waived the defect by failing to demur. *Unless we overrule Langford the present case must be reversed.*
>
> * * * * *
>
> Because of the defect in the indictment in failing to name the owner of the property allegedly embezzled, this case is reversed and remanded. The defendant will be held under the same bond to await further action of the grand jury. (Emphasis added). (193 So.2d at 729).

We have departed from *Langford* without overruling it, as we stated must be done.

The opinion in this case seems to indicate that the appellant waived his right to challenge the validity of the indictment by failure to raise this question in the trial court. Appellant made a motion for a directed verdict after the state rested, and he requested a peremptory instruction directing the jury to find him not guilty after both sides had rested. He also filed a motion for a new trial, which was overruled. It is true he did not specifically point out to the trial court the

fatal defect in the indictment, but this was not necessary. In Crosby v. State, 191 Miss. 173, 2 So.2d 813 (1941), the appellant was convicted on the charge of having burglarized "a certain building commonly called a store building in which there was then and there kept for use and safety money, tobacco and other articles of merchandise and other valuable things of Mrs. Thelma Hicks [there situated]." The appellant failed to demur to the indictment but requested the court to peremptorily instruct the jury to find him not guilty at the conclusion of all the evidence. There was also a motion for a new trial, but the insufficiency of the indictment to charge the ownership of the building alleged to hav been burglarized was raised for the first time in this Court. This is the same situation as we have in the case before us. This Court held that the failure to properly charge the ownership of the building went to the very essence of the offense charged, and the fatal defect was not waived by the appellant's failure to demur to the indictment. In conclusion this Court stated:

> The proof disclosed in the case at bar that the store building alleged to have been burglarized is located in the Town of Seminary in Covington County, but the indictment not *alleging the ownership thereof as aforesaid,* merely state that the building was "a certain store building" in Covington County, and the indictment not being on conformity with the law, the purpose of which is to enable the defendant to make his defense of former acquittal or conviction on the record in a subsequent trial for the same offense as was held to be necessary

> in the Cooksey case, supra, it is fatally defective and the cause must be reversed and remanded. (Emphasis added). (191 Miss. at 178, 2 So.2d at 815).

Since the failure to properly charge the ownership of the money obtained from the bank is an essential element of the offense attempted to be charged against the appellant, he could raise this question for the first time in this Court. The reason for this rule is that a person being tried for a crime is presumed to be innocent until he has been convicted after being charged by an indictment which charges him with all the essential elements of the offense for which he is being tried. When an indictment fails to charge an essential element of the offense, its validity may be questioned for the first time in this Court.

We are unable to agree that the indictment in a criminal case is a mere "pleading". Article III, Mississippi Constitution § 27 (1890) requires an indictment before any person can be prosecuted on a felony charge. The indictment is a written accusation or a charge against one or more persons of a crime, and it must be presented on oath by a legally constituted grand jury. In order for an indictment to be valid, all the formal prerequisites must be complied with, including all the constituent elements of the crime attempted to be charged. Under the law of this state, the failure to properly charge any essential element of the crime is a fatal defect and cannot be amended except by consent of the grand jury returning the indictment. The opinion in this case recognizes that the ownership of property obtained by false pretense must be charged,

but what it fails to recognize is that under the former decisions of this Court it must be directly charged. Furthermore, this is a general rule with few exceptions. In 41 Am.Jur.2d, Indictments and Presentment § 146 (1968), it is said:

> Ownership.
>
> Questions as to the necessity and sufficiency of an allegation of ownership of property which constitutes the subject matter of an offense are usually so specific in their nature that they cannot logically be dissociated, even in generalized form, from the specific offense in respect of which they arise. In all such cases they are fully considered in the topic treating of the specific offense. A few rules of more or less general application are deducible from the specific authorities, which are proper for consideration here. *Thus, it is the general rule that in the absence of statute, the ownership of property involved in the commission of an offense must be directly alleged where such ownership is an essential element of the offense charged,* or where it is necessary to apprise the accused of the nature and cause of the accusation against him. However, unnecessary or impossible specification of ownership is not required. (Emphasis added).

We are not in accord with the statement in the majority opinion that the recent view that the allegations of an indictment for false pretense with respect to ownership of money or property fraudulently obtained

may be sufficiently charged without direct words, where such ownership appears from a reasonable construction of the indictment as a whole, is the correct view. One of the reasons why the ownership of the property or money should be directly charged is so it may form the basis of a plea of former jeopardy in any subsequent proceeding. It is obvious in this case that appellant could be indicted again under the same statement of facts set out in the indictment with an additional charge that the $8,100 obtained from the bank was the property of someone else, and if the proof sustained such a charge, his present conviction would not constitute former jeopardy under our law.

This Court follows the doctrine of *stare decisis* and under this doctrine we follow our former decisions, unless such decisions are manifestly wrong and mischievous in their results. If the decisions in *Hubanks, Langford* and *Meyer(s), supra,* are manifestly wrong and mischievous, which they are not, we should say so and overrule them, otherwise we should adhere to them and sustain this petition for a rehearing.

Appellant in making his defense to the charge against him was entitled to rely upon the foregoing decisions, and our failure to adhere to these decisions deprives him of a valuable right. It is our considered opinion that this Court was in error in failing to reverse this case and for the reasons stated the petition for rehearing should be granted.

Petition for rehearing denied.

ETHRIDGE C. J., GILLESPIE, P. J., and SMITH, ROBERTSON and HARPER, JJ., concur.

RODGERS, BRADY, PATTERSON and INZER, JJ., dissent.

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§ 2149. False pretenses and cheats — obtaining the signature, money, or property of another.

Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained.

SOURCES: Codes, Hutchinsons 1848, ch. 64, art. 12, Title 4 (53); 1857, ch. 64, art. 105; 1871, § 2569; 1880, § 2811; 1892 § 1086; 1906, § 1166; Hemingway's 1917, § 893, 1930, § 919.

CROSS REFERENCES: Innkeepers and Hotel Companies §§ 7154, 7155.

REFERENCES: See generally, 22 Am Jur 443, False Pretenses and Allied Criminal Frauds.

* * * *

§ 2150. False pretenses and cheats — penalty of last section extended in certain cases.

If the false token by which any money, personal property, or valuable thing shall be obtained, as specified in the last section, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any person, banking company, or moneyed corporation not in existence, the person convicted of such cheat shall be punished by imprisonment in the penitentiary not exceeding seven years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (54); 1857, ch. 64, art. 106; 1871, § 2570; 1880, § 2812; 1892, § 1087; 1906, § 1167; Hemingway's 1917 § 894; 1930, § 920.

REFERENCES: See generally, 22 Am Jur 443, False Pretenses and Allied Criminal Frauds.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

A. F. WESTMORELAND,
Appellant,

vs. No. 46,118

STATE OF MISSISSIPPI,
Appellee.

Notice is hereby given that A. F. Westmoreland, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of this court denying his Petition for Rehearing and remanding the case to the Lee County Circuit Court for resentencing on the 22nd day of March, A. D., 1971, and from his sentence imposed by the Lee County Circuit Court on May 17, 1971, wherein he was sentenced to serve a term in the Mississippi State Penitentiary of three years, with one year being suspended pending his good behavior.

This appeal is taken pursuant to 28 U. S. C. § 1257.

ROY O. PARKER
ATTORNEY FOR
APPELLANT
2225 WEST MAIN STREET
TUPELO, MISSISSIPPI 38801

CERTIFICATE

I, Roy O. Parker, Attorney for Appellant herein, do hereby certify that I have delivered a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States, to the Honorable A. F. Summer, Attorney General for the State of Mississippi, New Capitol Building, Jackson, Mississippi, by mailing him a copy of same to the above address, postage prepaid, on the 17th day of May, A. D., 1971; and filed an original of said Notice of Appeal with the Supreme Court of Mississippi at Jackson, Mississippi on the 18th day of May, A. D., 1971.

This the 25th day of May, A. D., 1971.

ROY O. PARKER
ATTORNEY FOR
APPELLANT
2225 WEST MAIN STREET
TUPELO, MISSISSIPPI 38801

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-254

A. F. WESTMORELAND,
Petitioner,

vs.

THE STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

A. F. SUMMER
Attorney General
State of Mississippi
WILLIAM A. ALLAIN
First Assistant Attorney General
P. ROGER GOOGE, JR.
Special Assistant Attorney General
Counsel for Respondent
P. O. Box 220
Jackson, Mississippi 39205

R. L. MIDKIFF, Inc., 926 Cherry Street, Kansas City, Mo. 64106, 421-2020

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STATUTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-254

A. F. WESTMORELAND,
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THE STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The Opinion of the Mississippi Supreme Court is reported at 246 So.2d 487 and a copy is attached hereto as Appendix I.

JURISDICTION

Petitioner has stated that jurisdiction of this Court to review the Judgment of the Supreme Court of Mississippi in this cause is predicated upon 28 U.S.C.A. 1257 (3). Respondent, State of Mississippi, asserts that appellate jurisdiction is not conferred upon this Court.

STATEMENT

Petitioner, A. F. Westmoreland, has stated in effect in his Petition for Writ of Certiorari that certain constitutional rights that he has been granted have been violated in that the Supreme Court of Mississippi reversed several prior decisions upon which he relied in upholding his conviction. In particular, A. F. Westmoreland's entire argument is predicated upon the theory that the Supreme Court of Mississippi did not follow the doctrine of Stare Decisis. This simply, however, is not the case. In effect, the Supreme Court of Mississippi has never stated that the allegation of ownership in an indictment, with respect to ownership of property, has to be in "*direct words.*" The Mississippi Supreme Court has only stated that there must be a statement as to ownership (*Langford* v. *State*, 123 So.2d 614, at 615), or that the indictment would be dismissed if it failed to charge the ownership of the property (*State* v. *Hubanks*, 99 Miss. 775, 56 So. 163).

Therefore, the basic questions that are before this Court are: (1) Did the decision in the present case by the Mississippi Supreme Court reverse its prior decisions in *Langford, supra*, and *Hubanks, supra*? (2) If the Mississippi Supreme Court did refuse to apply its prior rulings concerning indictments and ownership of property, then does this Court acquire jurisdiction under 28 U.S.C.A. 1257 (3)?

If the answer to *either* one of the two questions presented above is no, then the Petition of A. F. Westmoreland should be denied.

ARGUMENT

I.

The Ruling of the Supreme Court of Mississippi in the Present Case Does Not Reverse Its Decisions in Langford, Supra, or Hubanks, Supra.

Justice Smith of the Mississippi Supreme Court stated in the Opinion in this case that:

> "The requirements of specificity with respect to allegation of ownership demand neither a deraignment of title nor a statement in 'direct terms' showing perfect title where ownership of the money or property obtained reasonably appears from the whole indictment and there is nothing in the indictment to support or suggest any other reasonable conclusion." 246 So.2d at 489, 490.

From a careful reading of the Opinion, it can be seen that the Court for the first time addressed itself to the question of whether "direct terms" were necessary in alleging ownership of property in an indictment.

As stated above, the *Langford* case and the *Hubanks* case neither spoke of an allegation of ownership having to be in "direct terms." These two cases upon which A. F. Westmoreland relied only stated in effect that there has to be a statement as to ownership or a charge of ownership. Neither state that "direct words" are necessary.

Justice Smith, in writing the Opinion in this case (Westmoreland), discusses for the first time whether an allegation of ownership in an indictment requires the use of "direct words" or not. After citing illustrative cases on each side, Justice Smith, in speaking for the Court, concludes:

> "We think the better reasoned view is that the allegations of an indictment for false pretenses, with respect to ownership of the money or property fraudulently obtained, may be sufficient without the use of direct words, where such ownership appears from a reasonable construction of the indictment as a whole." 246 So.2d 491.

It is asserted by Respondent then that the Supreme Court of Mississippi did not in effect reverse the *Langford* decision or the decision in *Hubanks*. In the present case, the Mississippi Supreme Court only discussed if an allegation of ownership required "direct words" when the ownership of the property reasonably appears from reading the indictment as a whole and when there is nothing in the indictment to support or suggest any other conclusion. The Mississippi Supreme Court did not reverse its decisions that the ownership has to be charged as is required in *Langford* and *Hubanks*. The Court only concluded that for an allegation to be specific it does not have to allege ownership in "direct words," when from reading the indictment as a whole no other conclusion can be reasonably drawn.

Thus, what the Court stated was that an indictment has only to *sufficiently charge* ownership and the use of "direct words" is not required.

As to the ownership being sufficiently charged in the present case, Justice Smith stated:

> "After careful consideration of the indictment in the present case we have concluded that in charging that Westmoreland,
>
> > '[W]*ith intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from*

> *the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. * * *
>
> (Emphasis added).'

sufficiently charged ownership by the Peoples Bank and Trust Company of the money obtained." 246 So.2d at 492.

Therefore, the Mississippi Supreme Court in *Hubanks* found that the indictment *failed to charge* ownership. (56 So. at 164.) In *Langford,* the Court stated: "In this case there is no statement at all in the indictment as to the ownership of the property." (123 So.2d at 616.) There the State Supreme Court found that "direct words" are not necessary concerning allegation of ownership and that the indictment *sufficiently charged* ownership when read as a whole.

In conclusion, an indictment still has to allege ownership and the allegation has to be sufficient. The allegation never has required nor does it now require the use of "direct words."

II.

Even If the Mississippi Supreme Court Did Overrule Its Previous Decisions, This Does Not Confer Jurisdiction upon This Court under 28 U.S.C. 1257.

Mr. Justice Brandeis, in speaking for the United States Supreme Court in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, stated:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions

on federal questions; *and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*" (Emphasis added.) 74 L.Ed. at 1113.

The Mississippi Supreme Court in its Opinion in this case addressed itself to the office of an indictment and then stated that "[t]here is, however, a trend away from the unnecessary redundancy and prolixity of former times." (246 So.2d 489.)

In the *Brinkerhoff* case, *supra*, the Court on touching on this point, stated:

"The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the state, it is for them to correct their errors and declare what the law has been as well as what it is. *State courts, like this court, may ordinarily overrule their own decisions without offending constitutional guaranties,* even though parties may have acted to their prejudice on the faith of the earlier decisions." (Emphasis added.) 74 L.Ed. 1114, n. 8.

In *Patterson* v. *Colorado ex Rel. Atty. Gen.*, 27 S.Ct. 556, 205 U.S. 454, 51 L.Ed. 879, Mr. Justice Holmes stated in the majority opinion:

"It is argued that the decisions criticized, and in some degree that in the present case, were contrary to well-settled previous adjudications of the same court, and this allegation is regarded as giving some sort of con-

stitutional right to the plaintiff in error. But while it is true that the United States courts do not always hold themselves bound by state decisions in cases arising before them, that principle has but a limited application to cases brought from the state courts here on writs of error. Except in exceptional cases the grounds on which the circuit courts are held authorized to follow an earlier state decision rather than a later one, or to apply the rules of commercial law as understood by this court rather than those laid down by the local tribunals, are not grounds of constitutional right, but consideration of justice or expediency. There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed." 205 U.S. at 460, 461.

Therefore, it is crystal clear in view of the above cases that there is no constitutional right to have all general propositions of law once adopted remain unchanged.

Concerning the right of Westmoreland to be informed of the charges, the indictment when read as a whole sufficiently charges ownership and there is nothing in the indictment to support or suggest any other reasonable conclusion.

After identifying beyond question the false writing sold to the bank by Petitioner and by means of which, the indictment continues:

> "[T]hat the said A. F. Westmoreland did, *with intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. . . . (Emphasis added)."

This Court stated in *Dunbar* v. *United States,* 156 U.S. 185, 39 L.Ed. 380, that any form of expression may be used which fully and accurately describes the offense and that the entire indictment is to be considered in determining if the offense is fully stated.

From reading the indictment in this case, there can be no question that the Petitioner knew what he was charged with. Further, the sufficiency of an indictment to charge a defendant with the crime of which he was convicted under state law does not present a federal question. *In re Robertson,* 15 S.Ct. 324, 156 U.S. 183, 39 L.Ed. 389. Nor does the misapprehension of the steps which a litigant's best interest require be maintained as grounds for interference by the United States Supreme Court as a denial of constitutional rights. *Market Street Ry. Co.* v. *Railroad Commission of State of California,* 65 S.Ct. 770, 324 U.S. 548, 89 L.Ed. 1171, rehearing denied 65 S.Ct. 1020, 324 U.S. 890, 89 L.Ed. 1438.

CONCLUSION

It is therefore submitted that the Supreme Court did not reverse its prior decisions in upholding Westmoreland's conviction; and even if the State court did reverse the prior decisions, under the authorities as set forth above the Petition should nevertheless be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi
WILLIAM A. ALLAIN
First Assistant Attorney General
P. ROGER GOOGE, JR.
Special Assistant Attorney General
Counsel for Respondent
P. O. Box 220
Jackson, Mississippi 39205

CERTIFICATE OF SERVICE

The undersigned of counsel certifies that a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Certiorari was this day mailed by United States Airmail, postage prepaid, to the following attorney of record for Petitioner:

Honorable Roy O. Parker
2225 West Main Street
Tupelo, Mississippi 38801
This the 22nd day of December, 1971.

.....

WILLIAM A. ALLAIN
Counsel for Respondent

IN THE SUPREME COURT OF MISSISSIPPI

No. 46,118

A. F. WESTMORELAND

v.

STATE

SMITH, JUSTICE:

A. F. Westmoreland was convicted of the crime of false pretenses in the Circuit Court of Lee County and sentenced to serve a term of 7 years in the penitentiary, of which 2½ years were suspended on good behavior. He appeals from that conviction and sentence.

The indictment on which Westmoreland was tried, omitting the formal part, was as follows:

> [B]eing then and there engaged in the business of selling farm machinery and equipment, feloniously and fraudulently represented to the Peoples Bank and Trust Company, Tupelo, Mississippi, a corporation, that a certain negotiable evidence of debt, to-wit: a conditional sales contract #39227, dated October 19, 1968, and purportedly signed by one D. J. "Doc" Kitchens, for the purchase of one Self-Propelled New Holland Combine, serial #341792, for the amount of $8950 was a valid contract, representing evidence of a bonafide purchase and a sale agreement between the said D. J. "Doc" Kitchens and the said A. F. Westmoreland, the said A. F. Westmoreland then and there well knowing the said conditional sales contract to be a false contract and not representing evidence of a valid purchase and sale transaction between the said A. F. Westmoreland and the said D. J. "Doc" Kitchens, and by virtue of this false representation and false pretense, that the said A. F. Westmoreland did, with intent to cheat and defraud the said Peoples Bank and Trust Company,

> sell the said conditional sales contract to the said Peoples Bank and Trust Company, and did thereby fraudulently obtain from the said Peoples Bank and Trust Company, Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Neither the sufficiency nor the validity of the indictment was challenged in the trial court by demurrer, motion to quash or otherwise. Moreover, the motion for a new trial, made by Westmoreland following his conviction, did not assign, as a ground therefor, any defect or deficiency in the indictment.

It is now argued, however, that appellant's motion for a directed verdict of not guilty should have been sustained because: (1) The indictment failed to state the ownership of the $8100 obtained from the bank, and (2) the proof was insufficient to show a violation of Mississippi Code 1942 Annotated section 2150 (1956) as alleged in the indictment.

In support of the first of these contentions (that the indictment failed to show ownership of the money), appellant relies on *Langford* v. *State,* 239 Miss. 483, 123 So.2d 614 (1960), and the authorities therein cited.

In *Langford,* the appellant had been indicted for embezzling two cows, and the indictment omitted to state to whom the cows belonged. The Court, in concluding to reverse, said:

> The appellant failed to demur to this indictment but he objected to the testimony as to ownership of the property, moved for a directed verdict and requested

> the Court to peremptorily instruct the jury to find him not guilty. There was also a motion for a new trial, due to the fact that the indictment in this case was void because it did not set out who owned the property alleged to be embezzled. (Id. at 486, 123 So.2d at 616.)

An indictment, of course, constitutes the "pleading" in a criminal case. Its office is to apprise the defendant of the charge against him in fair and intelligible language (1) in order that he may be able to prepare his defense, and (2) the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceedings. There is, however, a trend away from the unnecessary redundancy and prolixity of former times.

The requirements of specificity with respect to allegation of ownership demand neither a deraignment of title nor a statement in "direct terms" showing perfect title where ownership of the money or property obtained reasonably appears from the whole indictment and there is nothing in the indictment to support or suggest any other reasonable conclusion.

As stated by this Court in *Neece* v. *State,* 210 So.2d 657, 659 (Miss. 1968), in quoting with approval language used in *State* v. *Dodenhoff,* 88 Miss. 277, 40 So. 641 (1906):

> Preserving to a defendant the right to be duly informed of the nature and cause of the accusation made against him, there ought not to be, in addition to this, insistence upon forms which are purely technical and surplusage. There are too many reversals by far on technical grounds. They ought to be had, in those cases where the defendant is shown by the testimony to be manifestly guilty, only upon objection having real and substantial merit. 88 Miss. at 288, 40 So. at 643.

In the case here, after identifying beyond question the false writing sold to the bank by appellant and by means of which, the indictment charges, he fraudulently obtained from the bank $8100, in money, the indictment continues:

> [T]hat the said A. F. Westmoreland did, *with intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. . . . (Emphasis added).

In *Cohen* v. *State,* 101 Ga. App. 23, 27-28, 112 S.E.2d 672, 676 (1960), the Court of Appeals of Georgia, speaking to a contention that an indictment insufficiently set out ownership of funds obtained by false pretenses, said:

> The indictment in this case alleges that "Clarence Orr paid the sum of $2,100" for the worthless stock, "whereby the said Clarence Orr was cheated and defrauded out of the sum of $2,100." This is a sufficient allegation as to the ownership of the money under the authority of Scott v. State, 53 Ga. App. 61, 66, 185 S.E. 131.

In *State* v. *Timmerman,* 88 Utah 487, 488, 55 P.2d 1323, *concurring opinion,* 56 P.2d 1354 (1936), the Utah Supreme Court in discussing the question, said:

> Appellant, however, argued that the information does not state facts sufficient to constitute a public offense. We undertake to dispose of this question, as the same question may arise upon a new trial. The argument is based upon the contention that, in order to state the

offense of obtaining money under false pretenses, the information must affirmatively and specifically allege the ownership of the property, unless there is some legal excuse stated in the indictment or information for omitting the allegation. There is a division of authority upon that question. We need cite only an illustrative case on each side of the controverted question. New Jersey holds squarely in the case of State v. Samaha, 92 N.J. Law, 125, 104 A. 305, 306, that: "'Actual ownership' of the money or goods by the person upon whom the cheat is practiced is not essential. It is sufficient if he had lawful possession and dominion of the same." New Mexico and some other jurisdictions hold that an indictment or information for obtaining money by false pretenses is fatally defective unless the ownership of the property is directly and distinctly alleged. State v. Faggard, 25 N.M. 76, 177 P. 748. In the absence of statute the weight of authority, numerically, is with the rule announced by the case last above cited.

In a number of jurisdictions it is held that it is sufficient if it appears from the indictment or information to whom the property belonged. In the case of People v. Skidmore, 123 Cal. 267, 55 P. 984, the situation was presented of one fraudulently obtaining a signature to a promissory note. It was there held that the facts showed the ownership of the note as fully as though there was a direct allegation in the pleading to that effect. In the instant case it is made to appear from the allegations of the information, although not directly alleged, who the owner of the check was. It is made to appear that the check was the property of the Ostler Candy Company with such certainty that no other implication could possibly arise. We think the information sufficiently alleges ownership, and

being attacked on no other ground, the trial court did not err in admitting evidence over objection that the information did not state facts sufficient to constitute the offense charged.

In *Midgley* v. *State*, 29 Okla. Crim. 108, 232 P. 967 (1925), the Criminal Court of Appeals of Oklahoma, in rejecting a contention that an information charging false pretenses was insufficient because it failed "to allege the ownership" (of the property obtained), said:

> Several assignments of error are presented for the reversal of this case, it being first contended that the amended information on which plaintiff in error was tried is insufficient, in that it fails to allege unequivocally the ownership of the property charged to have been obtained by the false pretenses set out as the basis of the amended information. Numerous authorities are cited to the effect that it is necessary to state to whom the property belonged. The amended information does not in direct terms aver the ownership of the property. This court in the case of Fuller v. Ter., 2 Okl. Cr. 86, 99 P. 1098, upheld an information in practically the same language as the information in this case.
>
> It has been held in other jurisdictions that it is not a fatal defect to fail to allege the ownership in direct terms, if the indictment or information as a whole clearly discloses that fact. State v. Knowlton, 11 Wash. 512, 39 P. 966; Griggs v. U.S., 158 F. 572, 85 C.C.A. 596; State v. Balliet, 63 Kan. 707, 66 P. 1005; People v. Skidmore, 123 Cal. 267, 55 P. 984; State v. Boon, 49 N.C. 463; McClintock v. State, 98 Neb. 158, 152 N.W. 378; People v. Monroe, 64 App. Div. 130, 71 N.Y.S. 803. See, also in this connection

Douglas v. State, 15 Okl. Cr. 648, 179 P. 947; Bennett v. State (Okl. Cr. App.) 204 P. 462.

In *Ireton* v. *State*, 29 Okla. Crim. 266, 272, 233 P. 771, 773 (1925) the Court said in discussing a similar question:

> It appears to us that an allegation that a false pretense is made to a person, and, believing and relying thereon, and by reason thereof, the person to whom the representation is made parts with money is a sufficient allegation as to the ownership. The mere fact that the legal ownership of the money was in some other person who might ultimately have to bear the loss would not be available to the person accused. In the instant case it certainly made no difference to the plaintiff in error whether the money paid over to him on the forged note and mortgage was the property of the First State Bank of Ardmore or of some other person. The transaction is described with sufficient certainty to identify the act, and, if the allegation as to the person injured be erroneous, it is not material, nor does it result in any miscarriage of justice.

We think the better reasoned view is that the allegations of an indictment for false pretenses, with respect to ownership of the money or property fraudulently obtained, may be sufficient without the use of direct words, where such ownership appears from a reasonable construction of the indictment as a whole.

After careful consideration of the indictment in the present case we have concluded that in charging that Westmoreland,

> [W]*ith intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from*

> *the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100) good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. . . . (Emphasis added).

sufficiently charged ownership by the Peoples Bank and Trust Company of the money obtained.

The second of appellant's contentions involving the indictment is that the proof failed to show a violation of Mississippi Code 1942 Annotated section 2150 (1956), referred to in the indictment, and for that reason he was entitled to a directed verdict of not guilty.

Mississippi Code 1942 Annotated section 2150 (1956) actually is a continuation of and dependent upon, section 2149, which precedes it. Section 2149 defines the crime of false pretenses, and section 2150 merely adds another grade of the same offense for which it provides a more severe penalty when it is committed with the additional elements there enumerated. These sections are as follows:

> Section 2149.
>
> Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained.

Section 2150.

If the false token by which any money, personal property, or valuable thing shall be obtained, as specified in the last section, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any person, banking company, or moneyed corporation not in existence, the person convicted of such cheat shall be punished by imprisonment in the penitentiary not exceeding seven years.

In 41 Am. Jur. 2d *Indictments and Informations* section 88 (1968) it is stated:

Although there must be such specification of language as to bring the charge within the particular portion of the statute on which it is based, it has been held not necessary, where the offense is otherwise sufficiently particularized, to specify the exact section of the statute which is alleged to have been violated. In some jurisdictions, there are statutes providing that the statutory provision alleged to have been violated shall be set forth, and it has been held that a statute providing that it shall be sufficient to charge the defendant by using the name and article number of the offense committed is void, *but citation of the wrong statute in an indictment or information will be treated as mere surplusage when objection thereto is first raised on appeal unless it appears that defendant was misled or prejudiced.* (Emphasis added).

In 42 C.J.S. *Indictments and Informations* section 138 (1944), the rule is stated thus:

As a general rule, a misrecital of the statute does not avoid the indictment where the facts stated constitute an offense under any statute, especially where the objection is raised after plea of guilty. The mis-

> recital may be rejected as surplusage, at least where the conclusion is generally as "contrary to the statute in such case made and provided." However, the indictment may be invalidated by a material misrecital of the statute, where reference to the statute must be considered for the purpose of supplying an insufficient description of the offense, and the effect of the erroneous citation is to mislead or fail to inform accused fully and clearly of the charge he has to meet.

In *Harper* v. *United States*, 27 F.2d 77, 79 (8th Cir. 1928), the Court said:

> The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion, which may or may not be correct, and neither adds nor detracts from the allegations.

In *White* v. *State*, 169 Miss. 332, 338, 153 So. 387, 388 (1934), in rejecting a contention that an indictment was defective because it contained an incorrect citation of a statute alleged to have been violated, this Court said:

> It is also contended that the indictment is defective because it concludes with the words, "contrary to section 987, Mississippi Code of 1930, and against the peace and dignity of the State of Mississippi." This reference to section 987, Code 1930, is manifestly erroneous, as that section merely provides the penalty that may be imposed upon a conviction for murder. However, this reference to the statute was mere surplusage in the indictment, and the appellant could not have been prejudiced by this erroneous reference thereto. Smith v. State, 58 Miss. 867.

In the case now before us the attention of the trial court was not drawn to this matter in any way. The question was not raised either by demurrer, motion to quash, or in appellant's motion for a new trial made following his

conviction. As in other pleadings, the allegations of fact control as against legal conclusions of the pleader. We have concluded that the indictment in this case sufficiently charged facts which constituted the crime of false pretenses as defined by Mississippi Code 1942 Annotated section 2149 (1956). The proof overwhelmingly supported the charge against appellant, as laid in the indictment. However, it was error to impose sentence under the provisions of Mississippi Code 1942 Annotated section 2150 (1956), since the facts charged in the indictment and shown by the proof do not show that the commission of the offense was accompanied by the circumstances necessary to bring it within that section.

Other matters assigned as error have been examined and considered and are without merit.

The conviction of appellant of the crime of false pretenses (as defined in Mississippi Code 1942 Annotated section 2149 [1956]) is affirmed, the sentence imposed under section 2150 is set aside, and the case is remanded for imposition of sentence as provided by section 2149.

CONVICTION OF APPELLANT OF THE CRIME OF FALSE PRETENSES (AS DEFINED IN MISSISSIPPI CODE 1942 ANNOTATED SECTION 2149 [1956]) AFFIRMED, THE SENTENCE IMPOSED UNDER SECTION 2150 SET ASIDE, AND THE CASE REMANDED FOR IMPOSITION OF SENTENCE AS PROVIDED BY SECTION 2149.

GILLESPIE, P. J., and PATTERSON, INZER and ROBERTSON, JJ., CONCUR.

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IN THE

Supreme Court of the United States

No. 71-254

A. F. WESTMORELAND,
Petitioner,

versus

THE STATE OF MISSISSIPPI,
Respondent.

PETITION FOR RE-HEARING FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

ROY O. PARKER
Attorney At Law
2225 West Main Street
Tupelo, Mississippi 38801

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

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A. F. WESTMORELAND,

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THE STATE OF MISSISSIPPI,

Respondent.

PETITION FOR RE-HEARING FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Appellant presents his Petition for a re-hearing in the above entitled cause and in support thereof respectfully shows:

That the Mississippi Supreme Court, in their opinion, in A. F. Westmoreland vs State of Mississippi, denied A. F. Westmoreland the guarantees of the Fifth Amendment to the United States Constitution, which states:

> "... Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived of life, liberty or property without due process of law ..."

The indictment in the case at bar did not adequately describe the property in question so as to allow a plea of former jeopardy to subsequent indictments.

The Petitioner, A. F. Westmoreland, was denied his Fourteenth Amendment Constitutional rights in that the Mississippi Supreme Court did not treat him fairly by abruptly changing the case law of the State of Mississippi; this change of law being the law on which A. F. Westmoreland relied at the trial level and which was not followed by the Supreme Court of the State of Mississippi.

The Mississippi Supreme Court, in their opinion in A. F. Westmoreland vs State of Mississippi, made such an abrupt departure from the case law of the State of Mississippi that this departure prevented A. F. Westmoreland from obtaining justice at the hands of the Mississippi Supreme Court and this failure to receive justice was a violation of A. F. Westmoreland's Fourteenth Amendment rights under the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for a re-hearing be granted and that upon further consideration, the judgment of the Supreme Court of the State of Mississippi be reversed.

ROY O. PARKER
ATTORNEY FOR
PETITIONER

CERTIFICATE OF COUNSEL

I, Roy O. Parker, counsel for the above named Petitioner, do hereby certify that the foregoing Petition For Re-Hearing is presented in good faith and not for delay.

ROY O. PARKER
COUNSEL FOR
APPELLANT

CERTIFICATE

I, Roy O. Parker, Attorney for Petitioner herein, do hereby certify that I have delivered a true copy of the foregoing etition For Re-Hearing For a Writ of Certiorari to The Supreme Court of the United States, to the Honorable A. F. Summer, Attorney General for the State of Mississippi, New Capitol Building, Jackson, Mississippi, by mailing him a copy of same to the above address, postage prepaid, on the ____ day of February, 1972; and filed an original of said Petition For Re-Hearing with the Supreme Court of the United States by mailing the original of same to their regular post office address of Supreme Court Building, Washington, D. C. 20543, on the ____ day of February, A. D., 1972.

This the ____ day of February, A. D., 1972.

ROY O. PARKER
ATTORNEY FOR
PETITIONER
2225 WEST MAIN STREET
TUPELO, MISSISSIPPI 38801